

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mrs Thi Hue Bui
VISA APPLICANTS:	Mr Minh Tan Nguyen Miss Hoai Gia Han Nguyen
REPRESENTATIVE:	Ms Victoria Choke (MARN: 1571702)
CASE NUMBER:	1916837
DIBP REFERENCE(S):	BCC2018/4013458
MEMBER:	Brendan Darcy
DATE:	27 July 2023
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211 of Schedule 2 to the Regulations; and • cl.309.221 of Schedule 2 to the Regulations.

Statement made on 27 July 2023 at 10:23am

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine spousal relationship – financial aspects – nature of the household – social aspects – nature of the commitment – decision under review remitted

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cls 309.211, 309.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 21 June 2019 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
3. The first named visa applicant (the visa applicant) applied for the visa on 29 June 2018 on the basis of their relationship with their sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 and cl. 309.221(1) because the delegate was not satisfied the visa applicant and the sponsoring partner were in a genuine marriage relationship for the purposes of section 5F.
5. The Tribunal has considered the evidence that was provided with the primary application but have also had the benefit of additional evidence that has been submitted to the Tribunal more recently. A summary of the evidence and the Tribunal's assessment about whether it is satisfied about the relationship, as required under subregulations 1.15A(2) and 1.15A(3)(a), (b), (c) and (d), is set out below.
6. The review applicant was represented in relation to the review.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

Whether the parties are in a spouse or de facto relationship

8. Clauses 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP*[2017] FCAFC 206.

Background

10. By way of background, the first named applicant, Tan Minh Nguyen, was born on 8 December 1964 in Ho Chi Minh City (Saigon) and is a citizen of Vietnam. While holding a Class TU Subclass 590 Student Guardian visa, the first named applicant visited the second visa applicant – his daughter from a previous marriage, who was studying in Australia in 2017.
11. The sponsor, Thi Hue Bui, was born on 10 September 1955 in Cam Ranh in Vietnam. The sponsor arrived in Australia in August 1984 holding a humanitarian visa and became an Australian citizen.
12. The visa applicant visited to Australia to accompany the second visa applicant, who was studying in Australia. The visa applicant and sponsor claim to have met in June 2017 when the visa applicant and his daughter were renting a house from the sponsor's daughter. A relationship developed between the sponsor and visa applicant and the sponsor invited him and his daughter to move into her house in November 2017.
13. Both members of this married relationship have indicated they were previously married and that those marriages were dissolved. The visa applicant claimed his marriage was dissolved on 31 January 2018 while the sponsor claimed her previous marriage ended on 7 October 1994.
14. The parties married in Australia on 26 May 2018.
15. At the visa applicant applied for a combined Class UF/Class BC visa application on 29 June 2018 on the basis of their relationship with the sponsor. The second visa applicant was attached to the combined visa application on the basis she is belongs to the same family unit as the visa applicant. The second visa applicant was born in Vietnam on 23 February 2001 and had been holding a Class TU Subclass 500 student visa.
16. The visa applicant departed Australia in December 2019 when his Student Guardian visa expired. The second visa applicant remained as a student visa holder.

Are the parties validly married?

17. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship.
18. On departmental file is a certified copy of the parties' marriage certificate indicating their marriage was solemnised on 26 May 2018 at Heidelberg West in metropolitan Melbourne. The certificate was issued by the relevant authority in the State of Victoria on 15 June 2018.
19. A marriage will be considered void under s 23B/s 88D of the *Marriage Act 1961 (Cth)* (the Marriage Act), should a person claiming to be party to a marriage be lawfully married to someone else. There is sufficient evidence on departmental that both these marriages were dissolved in their respective jurisdictions, and the divorces occurred prior to date of the marriage between the parties relevant to this application for review. Accordingly, this consideration is not applicable.
20. On the evidence, the sponsor and the visa applicant were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a) and the Marriage Act.

Are the other requirements for a spouse relationship met?

21. The Tribunal has considered the evidence that was provided with the primary application but have also had the benefit of additional evidence that has been submitted to the Tribunal more recently. A summary of the evidence and the Tribunal's assessment about whether it is satisfied about the relationship, as required under subregulations 1.15A(2) and 1.15A(3)(a), (b), (c) and (d), is set out below.

Financial aspects

22. The delegate took into consideration the limited evidence about the financial aspects of their relationship, including the opening a joint bank account and bank statements for the period between 1 October 2018 to 12 February 2019. The statements however showed limited transactions for the household.
23. Given the period that the couple have been resident in the same country, with the claim of being a committed couple, the delegate found there was an absence of evidence of financial commitment towards each other demonstrating a lack of commitment to the claimed relationship.
24. Subsequently, the Tribunal has received additional evidence, including statements that it is difficult for the couple to combine their financial assets and liabilities as they have been living separately in different countries. They claim however that when they lived together prior to the visa applicant's departure to Vietnam during which they both contributed to the family budget and jointly paid for daily expenses. Although the visa applicant is not currently in Australia, utility statements dated 2019 to 2023 for the sponsor's residence indicate the bills are still in joint names.
25. With regards to the couple's joint bank account in Australia, more recent statements were submitted. The couple claim the visa applicant has put money into this account to pay towards the second visa applicant's education and living expenses in Australia. The statements show money transfers from the visa applicant into the account. In a statement from the secondary visa applicant, it is stated the sponsor also financially supports her, and did so when her father was unable to send funds during restrictions imposed in Vietnam arising from the coronavirus pandemic between early 2000 and late 2021.
26. On balance, the Tribunal is satisfied that the financial commitment presented gives strong support for the existence of a genuine and continuing relationship between the married couple for the purpose of r 1.15A(3)(a).

Nature of the household

27. The delegate assessed the limited evidence regarding the statements from the visa applicant and sponsor indicating that they were residing the same address as evidence they were living together before the visa applicant's December 2019 departure.
28. Subsequently, the Tribunal has received an elaboration of that period and evidence to have resided together when the sponsor visited Vietnam in 2019, 2022 and 2023.
29. After the visa applicant's Guardian visa expired, he returned to Vietnam. The sponsor claims she continued to care for his daughter, the secondary visa applicant, and to treat her as the sponsor's own daughter. The visa applicant says he lived happily with the sponsor and that they undertook daily activities such as cooking, shopping and cleaning the house together. He is very grateful that the sponsor takes care of and that she loves his daughter as her own child.

30. In cases where the couples are living separately but not necessarily permanently apart, the evidence can be limited. In this matter, they have demonstrated they support each other as well as the second visa applicant in her education and general wellbeing as she continues to reside with the sponsor.
31. On balance and despite the difficulties of living separate for most of their marriage relationship, the Tribunal is satisfied that the nature of household evidence gives sufficient support as on where they have shared living spaces and daily routines, for the purposes of r 1.15A(3)(b).

Social aspects of the relationship

32. To the Department, the couple submitted photographs showing them with friends and family on different occasions. There are also statements in support were provided by the sponsor's cousin and daughter who declared they recognised the visa applicant and sponsor as a genuine couple. The delegate found this limited evidence to be not commensurate with a socially recognised marriage.
33. The evidence before the Tribunal has been more substantial. The couple have provided further supporting statements from family and friends and numerous photographs taken of the couple with family and friends in Vietnam and with the couple sightseeing. The photographs include the sponsor with the visa applicant's son and his wife.
34. There are also supporting statements from several friends and relatives. These include statements from the sponsor's cousin who says she knew them as a couple in Australia and has seen how lonely the sponsor is since the visa applicant had to return to Vietnam. There is a statement from the sponsor's daughter who says the visa applicant was welcomed into their family and she sees the parties constantly keeping in touch. Another statement is from a friend of the sponsor's daughter who saw the parties living harmoniously together in Australia; a relative of the visa applicant who has socialised with the couple in Vietnam and sees how sad the visa applicant is when the sponsor returns to Australia. And another statement from a neighbour of the visa applicant who has socialised with the couple in Vietnam and sees how sad the visa applicant is when the sponsor returns to Australia.
35. While the couple have provided some evidence to demonstrate the social aspects of your relationship, it is somewhat limited but that is understandable given their physical separation from each other. Nonetheless, the Tribunal is satisfied the available evidence is commensurate of a socially recognised marriage which presents itself to family and friends as the couple being in a committed married relationship, or are regarded by people as such, for the purposes of r 1.15A(3)(c).

Nature of the persons' commitment to each other

36. The evidence considered by the delegate was limited, including a statement describing their relationship the visa applicant said they lived together happily and harmoniously and looked after each other prior to and since their marriage began. Along with photographic evidence, the delegate considered this insufficient of them making a lifelong commitment to each other.
37. The couple have now been married for nearly 5 years. Although the visa applicant had to return to Vietnam in December 2019, when his Student Guardian visa expired, there is evidence from phone and chat records that the parties have maintained contact since that time. There is also evidence, including travel documents and photographs, to show the sponsor has travelled to Vietnam three times in 2019, 2022 and 2023 and spent time with the visa applicant there.

38. The couple state that each time the sponsor has returned to Australia has been very difficult for them and they have come to rely on each other, during the difficult times such as during Covid restrictions. They have also presented consistently a committed to supporting, the secondary visa applicant in Australia and her education in a manner consisted of a couple with a common purpose.
39. Taking into account that the sponsor has returned to Vietnam three times to spend time with the visa applicant, this appears to have been a significant financial commitment commensurate with her commitment to deepen her emotional bonds with the visa applicant. Based on this and the other supportive information provided, the Tribunal is satisfied that the visa applicant and the sponsor provide each other with companionship and emotional support and that they view the relationship as long term for the purposes of r 1.15A(3)(d).
40. For the purposes of r 1.15A(2), the Tribunal has considered adverse commentary by the delegate that there was haste between the visa applicant's divorce in January 2018 and his marriage in May in the same year. In examining the divorce proceedings as outlined in the visa applicant's divorce order, the Tribunal notes the visa applicant's wife had petitioned the relevant authority in Vietnam in August 2017 and that it mentions the visa applicant had been living separately four years prior. It was not reasonable for the delegate to dwell on the short period between the visa applicant's divorce and remarriage without examining the divorce order. Clearly the previously marriage had already broken down prior to the divorce for a notable period and the Tribunal places no adverse weight between the short period between the visa applicant's divorce order and marriage to the sponsor.
41. The Tribunal also notes the delegate placed notable adverse weight on discrepancies or lack of knowledge of each other during the Departmental interview. In the context of the overall information, this approach appeared too strident and disproportionate and places only negligible weight on it in considering the marriage lacked genuineness.
42. There are no other circumstances to consider for the purposes of r 1.15A(2).
43. There is insufficient evidence to suggest that this relationship is not genuine or is contrived and based on the overall favourable evidence, the Tribunal is satisfied that the applicant and the sponsor have a mutual commitment to shared life to the exclusion of others.
44. Therefore, it is satisfied their relationship is genuine and continuing and there is no evidence that they live separately and apart on a permanent basis.
45. On the basis of the above the Tribunal is satisfied that each of the requirements between parts (2)(b), (c) and (d) of section 5F is met at the time the visa application was made and the time of this decision.
46. Therefore, the visa applicant **meets cl.309.211 and cl.309.221**.

Second visa applicant

47. The Tribunal notes that the second applicant was aged 17 and four months at the time of applicant and is reached 22 years and 5 months.
48. In circumstances where members of a family unit make a combined application together, only one member of the family needs to satisfy the primary criteria: regulation 309.321(a) or (b).
49. The correct and preferable decision is to set this matter aside and for the Department to determine whether the visa applicant satisfies the primary criteria, and then to go on to

consider whether the second applicant is a member of the same family unit as the visa applicant for the grant of a Partner (Provisional) (Class UF) (Subclass 309) visa.

Conclusion

50. The Tribunal is satisfied that the couple in question is married to each other under a marriage that is valid for the purposes of s 5F(2)(a) and the requirements of the Marriage Act.
51. On the basis of the above-mentioned findings, the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
52. For the reason outlined above, the first named visa applicant meets cl.309.211 and cl.309.221.
53. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa, including in relation to the second named visa applicant.

DECISION

54. The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.211 of Schedule 2 to the Regulations; and
 - cl.309.221 of Schedule 2 to the Regulations.

Brendan Darcy
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).